

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BAO XUYEN LE, as Personal Representative
of the Estate of TOMMY LE; HOAI "SUNNY"
LE; and DIEU HO,

Plaintiffs,

vs.

REVEREND DR. MARTIN LUTHER KING
JR. COUNTY; and KING COUNTY DEPUTY
SHERIFF CESAR MOLINA,

Defendants.

No. 2:18-CV-00055-TSZ

DEFENDANT KING COUNTY'S
SUPPLEMENTAL BRIEFING TO
THE COURT'S MINUTE ORDER
NO. 272

Noted for: February 25, 2021

I. ARGUMENT

Defendants King County and KCSO Deputy Cesar Molina filed separate
Objections To A Fully Virtual Trial. See *Dkts. 168 & 271*. Plaintiffs filed no response. The
Court then ordered the parties to file supplemental briefing on that issue as well as
factors specific to this trial. *Dkt. 272*.

The parties were asked to address whether this Court could still require the trial
to be conducted virtually over the defendants' objections in light of *Liu v. State Farm*

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1 *Mut. Auto. Ins. Co.*, --- F. Supp. 3d. ---, 2020 WL 8465987 (W.D. Wash. Dec 17, 2020), *Dkt.*
 2 272(k). While one takeaway from *Liu* is that the trial court exercised that option under
 3 Fed. R. Civ. 43(a)¹, no appellate court has yet affirmed such a decision when one party
 4 objects. And, the admitted liability, one-week trial in *Liu* is decidedly different from the
 5 multiple party, complicated legal three-week trial in this case.² See ABA Journal
 6 Weekly Newsletter, “Judges differ on when it’s safe to hold in-person jury trials”
 7 (2/19/21)(citing that U.S. District Court Judge Robert Lasnik found that unfeasible
 8 social distancing requirements, a lack of protective equipment and his belief that risks
 9 to certain demographics, including the elderly and people with underlying health
 10 conditions, make it “difficult, if not impossible, to obtain a jury pool that would
 11 represent a fair cross section of the community”).³ The reasoning by these learned
 12 judges should be weighed against the rationale offered in *Liu*. Additionally, King
 13 County Superior Court began conducting live trials again last week in light of the
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 18 ¹ The Notes of Advisory Committee on FRCP 43 emphasize, “The importance of presenting live
 19 testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact-
 20 finder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a
 21 witness face-to-face is accorded great value in tradition.”

22 ² In *United States v. Fanyo-Oatchou*, 2020 WL 6685063, U.S. District Judge John C. Coughenour
 23 continued a criminal trial to June 2021 finding:

1. “The COVID-19 pandemic has made it difficult for the Court to obtain an adequate spectrum
 of jurors to represent a fair cross section of the community, which would likely make
 proceeding with an earlier trial date impossible or would result in a miscarriage of justice. See
 18 U.S.C. § 3161(h)(7)(B)(i).

2. Public health guidance has impacted the ability of jurors, witnesses, counsel, and Court staff
 to be present in the courtroom. Therefore, proceeding with an earlier trial would be impossible
 or would result in a miscarriage of justice. See 18 U.S.C. § 3161(h)(7)(B)(i).

³ *U.S. v. Arumugam*, CR19-041RSL.

1 Governor significantly reopening the State and the greatly reduced COVID-19 numbers
2 over the last couple of weeks.

3 King County strongly objects to a remote trial and the following responses to the
4 Court's Minute Order should not be viewed as a waiver of its stated position.

5 King County addresses the subjects in Paragraph 2 starting with 2(c), the
6 anticipated number of trial days. The parties originally estimated up to 15 court days.
7 That was before the pandemic outbreak so an additional 1-2 days may be needed to
8 conduct *voir dire* remotely and to deal with anticipated technical challenges that have
9 plagued virtual trials. In addition, Paragraph 2(c) necessitates recognition that any
10 prolonged requirement of the jurors to follow the trial remotely will add to the number
11 of days of trial. And, as discussed in *Liu, supra*, "the trial days will be shortened (and
12 include several breaks) to further reduce the possibility of distraction and/or fatigue
13 among the jurors." As a result, a fully remote trial will likely necessitate additional trial
14 days.⁴

16 As to Paragraph 2(d), number of exhibits and 2(e), number of witnesses, King
17 County believes its previous representation of 85 exhibits and 40 witnesses for trial is
18 accurate. Defendants will work with opposing counsel to address admissibility of
19 exhibits pretrial to expedite the proceedings.

22 _____
23 ⁴ That being said, defendants have dispositive motions pending that, if granted, will greatly
streamline the trial. Defendants intend to file supplemental motions in limine which, if granted,
could also drastically reduce the length of trial.

1 As to Paragraph 2(f), regarding witnesses testifying remotely however the trial is
 2 conducted, King County believes any non-King County witnesses who are concerned
 3 about appearing in-person due to the pandemic and certain out-of-state experts should
 4 be able to testify remotely.

5 As to Paragraph 2(j) limiting the number of attorneys and litigation staff in the
 6 courtroom, King County will require its two counsel, one paralegal, one tech support
 7 and a King County representative at all times.⁵

8 As to Paragraph 2(g), the impact on jurors of an in-person trial, King County
 9 believes that with an 8-person jury, any in-person attendance can be accommodated.
 10 King County Superior Court has placed jurors in the spectator seating area to ensure
 11 adequate social distancing.

12 As to Paragraph 2(h), remote jury deliberations, King County strongly believes
 13 all deliberations should be conducted in-person. This will ensure continuity and focus.

14 As to Paragraph 2(i) access of the public to trial, that can be accomplished by
 15 access to a remote platform.

16 II. CONCLUSION

17 Defendant King County respectfully requests that this trial be tried in-person in
 18 its entirety for the reasons outlined in its Objections To a Fully Virtual Trial. Defendants
 19 will be irreparably prejudiced by a proceeding that cannot obtain an adequate spectrum
 20 of jurors to represent a fair cross section of the community due to the COVID-19
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⁵ It is anticipated co-defendant Cesar Molina and his counsel will also be present with King County throughout trial, while properly socially distanced.

1 pandemic. There is no measurable prejudice to setting a new trial date in the near future
2 that affords a traditional and proven method to seek justice.

3
4 DATED this 23rd day of February, 2021 at Seattle, Washington.

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King County Prosecuting Attorney

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CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on February 23, 2021, I electronically filed the foregoing document(s) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following participants:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 23rd day of February, 2021 at Bellevue, Washington.



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Legal Assistant
King County Prosecuting Attorney's Office